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No. 80-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF APPELLANTS

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:
DEAN RINGEL
SUSAN BUCKLEY
SUSAN E. FINE
MARTHA A. SCARF
CAHILL GORDON & REINDEL

THEODORE B. OLSON
515 South Flower Street
Los Angeles, California 90071
(213) 488-7000

Of Counsel:
WAYNE W. SMITH
GIBSON, DUNN & CRUTCHER

Attorneys for Appellants

November 28, 1980

Questions Presented

1. May the City of San Diego, consistently with the First and Fourteenth Amendments to the United States Constitution, eliminate and totally prohibit all outdoor advertising within the City when, pursuant to stipulated facts, (a) outdoor advertising exists only in areas of San Diego zoned for commercial and industrial purposes; (b) outdoor advertising is a distinct means of communication and a medium for the expression of ideas and a forum for the communication of messages to the public; and (c) outdoor advertising communicates valuable commercial, political and social information which many businesses, politicians and other persons rely upon because other forms of advertising are insufficient, inappropriate and prohibitively expensive?

2. May the police power of the City of San Diego be utilized, consistently with the Fourteenth Amendment to the United States Constitution, to eliminate and totally destroy the legitimate and lawful business of outdoor advertising within San Diego?

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF OF APPELLANTS

Opinions Below

The Memorandum of Intended Ruling of the Superior Court, County of San Diego, State of California and Order enjoining enforcement of San Diego Ordinance No. 10795

(New Series) are unreported. Copies are contained in the appendix to the Jurisdictional Statement commencing at JS 81a.* The opinion of the Court of Appeal, Fourth Appellate District, was issued on February 11, 1977, was reported at 67 Cal.App.3d 84, 136 Cal.Rptr. 453, and was vacated by the action of the California Supreme Court in granting a hearing. It is contained at JS 65a. An opinion of the Supreme Court of California, initially issued on March 21, 1979, was reported at 23 Cal.3d 762, 592 P.2d 728, 154 Cal.Rptr. 212. A petition for rehearing was granted on May 23, 1979 (having the effect of vacating the March 21, 1979 opinion) and the opinion of the Supreme Court of California on rehearing was issued on April 14, 1980, as modified on denial of further rehearing on May 14, 1980. It is reported at 26 Cal.3d 848, 610 P.2d 407, 164 Cal.Rptr. 510 and is set forth at JS 1a.

Jurisdiction**

The subject of this case is the constitutionality of an ordinance adopted by the City of San Diego, California, which would totally eliminate and destroy the entire outdoor advertising industry within the city limits. In an opinion dated April 14, 1980, as modified on denial of rehearing on May 14, 1980 (JS 1a, 64a), the Supreme Court of California held San Diego Municipal Ordinance No.

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* References to "JS ....a" are to appropriate pages of the appendix to the Jurisdictional Statement.

** Pursuant to Rule 28.1, appellants advise the Court that Metromedia, Inc. has no parent or corporate affiliates and no subsidiaries other than wholly owned subsidiaries. Prior to June 7, 1979, Pacific Outdoor Advertising Co., Inc. ("POA") was a wholly owned subsidiary of Combined Communications Corporation. On June 7, 1979, POA became a wholly owned subsidiary of Gannett Co., Inc. POA has no subsidiaries. Gannett Co., Inc. has no corporate affiliates and has two subsidiaries which are not wholly owned: Mediacom Industries, Inc. and Utica Observer-Dispatch, Inc.

10795 (New Series) not to be violative of the United States Constitution. A Notice of Appeal was filed on July 25, 1980, a copy of which is set forth at JS 102a.

Jurisdiction of this Court to review the final judgment of the Supreme Court of California is conferred by 28 U.S.C. § 1257(2) (1976). Probable jurisdiction was noted by this Court on October 14, 1980.

Constitutional and Statutory Provisions

Relevant portions of the First and Fourteenth Amendments to the United States Constitution and the entirety of San Diego Municipal Ordinance No. 10795 (New Series) are set forth at JS 104a.

Statement of the Case

A. *The Stipulated Facts*

The parties—the City of San Diego and appellants—have stipulated to the basic facts which govern the disposition of this litigation.* Those facts may be summarized as follows.**

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* Under California law, both the parties and the courts are bound by the terms of the stipulation. *Greatorex* v. *Board of Administration*, 91 Cal.App.3d 54, 58, 154 Cal.Rptr. 37, 39 (4th Dist. 1979); *Capital National Bank* v. *Smith*, 62 Cal.App.2d 328, 343, 144 P.2d 665, 673 (3d Dist. 1944). This Court has, of course, frequently relied upon stipulations of fact. *See, e.g., Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 657 n.5 (1980); *Marquette National Bank of Minneapolis* v. *First of Omaha Service Corp.*, 430 U.S. 299, 311-12 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 750 n.3, 752 nn.4, 6, 7 (1975).

** The Joint Stipulation of Facts is set forth at JS 119a as Appendix H to the Jurisdictional Statement. It is also set forth in the Joint Appendix commencing at page 41a. References to "JS ....a, ¶ ...." are to appropriate pages of the Appendix to the

1. The City of San Diego

San Diego is the second most populous city in California (JS 120a, ¶ 3) and the center of government for a county containing one and one-half million people. (JS 120a, ¶ 4) The City covers 320 square miles (JS 120a, ¶ 5), larger than the combined areas of Atlanta, Cleveland, Pittsburgh and Miami and over four times the area of the District of Columbia (Rand McNally & Co., *1979 Commercial Atlas & Marketing Guide* 55-58 (110th ed. 1979)).

San Diego is "multi-faceted, containing beaches, hills, residential areas, parks, a major seaport and naval base, a substantial commercial area, hundreds of miles of streets, highways and freeways, a large industrial area, a major airport and numerous major industries." (JS 120a, ¶ 6) Its citizens find employment in all walks of life, "including retail businesses, heavy industry, commercial centers, tourist services, agriculture, government contracts, wholesale supplies and a variety of services." (JS 120a, ¶ 7) San Diego itself consists of the old and the new, the modern and the obsolete, the aesthetically attractive and the blighted. (JS 121a, ¶ 8)

Figures contained in the San Diego General Plan adopted in 1967, which may be taken as true for all periods relevant to the litigation, indicate that citizens of San Diego were employed substantially as follows:

"Agriculture	1.6%
Construction	6.6%
Manufacturing	22.4%

Jurisdictional Statement and paragraph number of the Joint Stipulation. Quotations throughout the Statement of the Case are from the Joint Stipulation. References to "JA ...." are to appropriate pages of the Joint Appendix.

Transportation, Communication and Utilities	4.7%
Wholesale Trade	3.2%
Retail Trade	17.5%
Finance, Insurance and Real Estate	4.5%
Services	19.2%
Government	19.7%"

(JS 121a, ¶ 10)

2. The Business of Outdoor Advertising

Appellants are companies which have been legally engaged in the outdoor advertising business in San Diego for over 60 years. (JS 122a, 126a, ¶¶ 12, 15, 30) Appellants each own between 500 and 800 outdoor advertising displays in San Diego which are located on property leased to them for the purpose of erecting and maintaining such displays. (JS 122a, ¶¶ 13, 14)

All the signs owned by appellants in San Diego "are located at areas zoned for commercial and industrial purposes." (JS 123a, ¶ 20) These areas comprise only 2.8% of the total City. (JS 121a, ¶ 9)

All the displays were legally erected at substantial expense, in full compliance with state and local laws. (JS 122a, ¶¶ 15, 16) While the value of individual displays varies depending upon size, nature and location, the range is between $2,500 and $25,000,* each display having a remaining useful and substantial income-producing life in excess of 25 years. (JS 123a, 125a, ¶¶ 18, 19, 26)

Outdoor advertising signs differ in a variety of ways from on-site business signs. On-site signs advertise businesses, goods or services available on the premises. In

* As of the date of the stipulation executed on November 21, 1974. (JS 127a)

contrast, outdoor advertising companies lease real property and erect signs thereon which are made available to national and local advertisers for commercial, political and social messages. More specifically, "[o]utdoor advertising is different from on-site advertising in that:

> "(a) The outdoor advertising sign seldom advertises goods or services sold or made available on the premises on which the sign is located.
>
> "(b) The outdoor advertising sign seldom advertises products or services sold or made available by the owner of the sign.
>
> "(c) The outdoor advertising sign is, generally speaking, made available to 'all-comers', in a fashion similar to newspaper or broadcasting advertising. It is a forum for the communication of messages to the public.
>
> "(d) The copy of the outdoor advertising sign changes, usually monthly. For example, a particular sign may advertise a local savings and loan association one month, a candidate for mayor the next month, the opening of the San Diego Zoo the third month, a new car the fourth month, and a union grievance the fifth month."

(JS 123a-24a, ¶ 22)

"Outdoor advertising is customarily purchased on the basis of a presentation or campaign requiring multiple exposure. Usually a large number of signs in a variety of locations are utilized to communicate a particular advertiser's message. An advertiser will generally purchase a 'showing' which would involve the utilization of a specific number of signs advertising the same message in a variety of locations throughout a metropolitan area. Each sep-

arate sign provides exposure of various portions of the populace and each sign thereby forms an integral part of an interdependent whole. As a result, each sign in addition to producing income in and of itself, lends value to the entire system. Therefore, each sign has a value substantially more as a part of the system than it does separately. The value of each sign as a part of an overall system is not readily susceptible to precise measurement." (JS 124a-25a, ¶ 24)

"Outdoor advertising is presented in two basic standardized forms. A 'poster panel' is a 12-foot by 24-foot sign on which a pre-printed message is posted, in sheets. A 'painted bulletin' is generally a 14-foot by 48-foot sign which contains a hand painted message. The message will remain in one place for a period of time, usually a month, and will then be disassembled and replaced by another message while the first message is moved to another sign. In this way, the same hand painted message will be moved throughout a metropolitan area over a six-month or twelve-month period." (JS 125a, ¶ 25)

3. The Nature of Outdoor Advertising

Outdoor advertising serves a wide range of social functions. As noted, "[i]t is a forum for the communication of messages to the public." (JS 123a-24a, ¶ 22(c)) It is, as well, "a means of communication and a media for the expression of ideas." (JS 123a, ¶ 21)

"Outdoor advertising is available for all forms of advertising messages. For example, it has been used in the City of San Diego to advertise national and local products, goods and services, new products being introduced to the consuming public, to publicize the 'City in motion' campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices,

including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors and to provide directions to the traveling public." * (JS 124a, ¶ 23)

Appellants' "outdoor advertising displays produce income to a variety of segments of the national, state and local economy and stimulate the flow of trade and commerce. Land owners and advertising agencies receive income from outdoor advertising." (JS 125a, ¶ 27)

"Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (JS 125a-26a, ¶ 28)

4. Ordinance No. 10795**

On March 14, 1972, the City Council of the City of San Diego adopted Municipal Ordinance No. 10795 (New Series)

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* Photographs of outdoor advertising displays conveying various political, community service, and public interest messages such as were viewed by the San Diego public were set forth before the California Supreme Court in a brief, *amicus curiae*, of the Pacific Legal Foundation. A number of these examples are reproduced as Appendix I to the Jurisdictional Statement at JS 128a. The photographs are of actual displays used in California and illustrate the precise facts to which San Diego stipulated. Some are referred to in the opinion of Justice Clark dissenting from the opinion of the California Supreme Court. (JS 51a)

** The text of the ordinance is set forth as Appendix G to the Jurisdictional Statement at JS 104a-18a.

("the ordinance"). (JS 120a, ¶ 1) The ordinance prohibits all outdoor advertising throughout San Diego and would, if enforced, "eliminate the outdoor advertising business" in San Diego. (JS 120a, 126a, ¶¶ 2, 29) It permits only on-site signs—*i.e.*, those which designate the owner or occupant of the premises upon which a sign is placed, or identify the premises or advertise goods manufactured or produced or services rendered there. (JS 107a)

There are a few partial exemptions for signs designating premises for sale, rent or lease, depicting time, temperature or news, for signs on benches, at bus stops and on buses and taxis, and for temporary political campaign signs which are maintained for no longer than 90 days and are removed within 10 days after the election to which they pertain. (JS 111a-12a) These exceptions would not encompass any of the advertisements set forth as Appendix I to the Jurisdictional Statement, nor any commercial use of billboards.*

All signs other than those few excepted from the reach of the statute—*i.e.*, all outdoor advertising signs—are to be removed, without compensation and at the expense of the owners, over a four-year period. (JS 107a-11a) The abatement or removal schedule set forth in the ordinance bears no reasonable relationship to the fair market value, useful life or income generated by the signs and was not designed to bear any such relationship. (JS 126a-27a, ¶ 34)

B. *The Litigation*

In these litigations commenced by appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., and

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* In fact, as counsel to San Diego has conceded, the destruction of outdoor advertising sought to be effected by the ordinance would necessarily preclude billboards being used for non-commercial as well as commercial purposes. (JA 60a-61a)

later consolidated by stipulation, an injunction was sought to enjoin enforcement of the ordinance. (JA 3a, 22a) After the filing of answers (JA 16a, 33a), the completion of discovery and the negotiation, drafting and execution by the parties of the Joint Stipulation, all parties moved for summary judgment. (JA 51a, 54a)

The Superior Court granted the motion of appellants for summary judgment, holding the San Diego ordinance unconstitutional as an unreasonable exercise of San Diego's police power and an abridgement of appellants' First Amendment rights. (JS 81a-97a) Enforcement of the ordinance was permanently enjoined by the Superior Court. (JS 98a-101a)

The Court of Appeal, Fourth Appellate District, unanimously affirmed, concluding that:

> "Here, we are not dealing with an ordinance which regulates or prohibits a few signs, or which affects only signs located in certain zones or areas of the City. Enforcement of the ordinance in question will require the removal of hundreds of signs having a conceded value in the millions of dollars. The facts before us indisputably show enforcement of the ordinance will bring about substantial private loss. While the stated purposes of the ordinance may be laudable, the City presents no convincing argument why the public benefits sought cannot be achieved by more reasonable and less drastic measures. The stipulated facts simply do not support the proposition that all off-premise advertising signs within the City are public nuisances, or that it is reasonably necessary to remove all of them to promote safety, general economic interests, or even aesthetic values. The ordinance is too broad, too general and too inclusive. We have

> no doubt the enactment of the ordinance and its attempted enforcement is beyond the power of city officials and constitutes an unreasonable and arbitrary exercise of the police power." (JS 80a)

Given its conclusion that the ordinance constituted a constitutionally insupportable use of the police power, the Court of Appeal did not "consider whether the broad sweep of the ordinance also infringes upon First Amendment or Equal Protection rights or whether its amortization provisions meet constitutional standards." * (JS 80a)

The California Supreme Court reversed in an opinion joined by four of its seven members. Rejecting the conclusion of both courts that had considered the case that San Diego had exceeded the constitutional scope of its police power, the Court concluded that the expressed purposes of "elimination of traffic hazards brought about by distracting advertising displays and the improvement of the appearance of the city" (JS 6a-7a) were sufficient to permit the total destruction of the outdoor advertising industry. Notwithstanding the total absence of any proof that traffic safety was adversely affected by outdoor advertising, the Court held that (a) appellants had failed to meet their supposed burden of demonstrating that traffic safety would *not* be advanced by the ban and (b) "as a matter of law," ordinances "which eliminat[e] billboards designed to be viewed from streets and highways reasonably relat[e] to traffic safety." (JS 7a)

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* Issues relating to Equal Protection and the constitutional adequacy of the amortization provisions were among a number of those raised by appellants at judicial levels prior to this Court. Other issues raised below included partial preemption under state law (an issue as to which the California Supreme Court, on rehearing, ruled in favor of appellants (JS 26a-39a)) and the failure of San Diego to comply with the California Environmental Quality Act.

As for the aesthetic considerations offered in support of the statute, the opinion held that such considerations alone could and did justify the total elimination of the outdoor advertising industry. In reaching its conclusion, the Court was obliged to—and did—overrule one California Supreme Court decision precisely to the contrary and disapproved of language "contrary to the views expressed herein" in five later decisions of the California appellate courts. (JS 18a n.12)*

The Court's treatment of the First Amendment issues raised by the case was ostensibly limited to the observation that the First Amendment contentions had, when the case was first argued before the California Supreme Court, "presented an arguable issue" but that this Court's dismissal of appeals in *Suffolk Outdoor Advertising Co.* v. *Hulse,* 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed,* 439 U.S. 808 (1978) and other cases constituted a firm resolution by this Court "that a prohibition of off-site billboards does not violate the First Amendment." (JS 20a) The California ruling did not deal with or advert to the limited effect that this Court has often stated that its summary dismissals are to be given**

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* The overruled case was that of *Varney & Green* v. *Williams,* 155 Cal. 318, 100 P. 867 (1909). Cases disapproved were *City of Escondido* v. *Desert Outdoor Advertising, Inc.,* 8 Cal.3d 785, 505 P.2d 1012, 106 Cal.Rptr. 172, *cert. denied,* 414 U.S. 828 (1973); *Desert Outdoor Advertising* v. *County of San Bernardino,* 255 Cal.App.2d 765, 63 Cal.Rptr. 543 (4th Dist. 1967), *appeal dismissed,* 393 U.S. 8 (1968); *County of Santa Barbara* v. *Purcell, Inc.,* 251 Cal.App.2d 169, 59 Cal.Rptr. 345 (2d Dist. 1967); *National Advertising Co.* v. *County of Monterey,* 211 Cal.App.2d 375, 27 Cal.Rptr. 136 (1st Dist. 1962); *City of Santa Barbara* v. *Modern Neon Sign Co.,* 189 Cal.App.2d 188, 11 Cal.Rptr. 57 (2d Dist. 1961).

** It has long been clear that while summary affirmances and dismissals are dispositions on the merits, *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975), they are "not of the same precedential

and did not otherwise directly consider the First Amendment issues raised.

The majority opinion then concluded that the San Diego ordinance did not violate the California equivalent of the

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value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 180-81 (1979) ("summary affirmances have considerably less precedential value than an opinion on the merits."). "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Fusari* v. *Steinberg*, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring).

Inherently, a summary disposition without opinion cannot adequately discuss or explain the issues at hand. "[J]urisdictional statements . . . rarely contain more than brief discussions of the issues presented" and thus cannot serve as a basis for "a conclusive resolution of an important constitutional question. . . ." *Colorado Springs Amusements, Ltd.*, v. *Rizzo*, 428 U.S. 913, 916-17 (1976) (Brennan, J., dissenting from denial of petition for writ of certiorari). Summary dispositions lack "any substantive discussion" of the issues, *Edelman* v. *Jordan*, 415 U.S. 651, 670 (1974), and only affirm the judgment but not necessarily the reasoning of the lower court, *Washington* v. *Confederated Bands and Tribes*, 439 U.S. 463, 477 n.20 (1979) (summary dismissal "does not, as we have continued to stress . . . necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action."). Thus, this Court has often afforded plenary hearing to allow "full opportunity to consider the issue," *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 75 (1976), "raised and decided" by a prior summary affirmance. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976).

Finally, summary dispositions have been narrowly interpreted to extend to only "the precise issues presented and necessarily decided," *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977), and "no more may be read into [the Court's] action than was essential to sustain that judgment." *Illinois State Board of Elections* v. *Socialist Workers Party*, *supra* at 183. This case, relating to a total ban on billboards in a major metropolitan area, differs significantly from all prior cases and thus raises distinct and significant constitutional issues.

First Amendment in that it was an appropriate time, place and manner regulation. (JS 20a-21a) Pursuant to that analysis, the court concluded that (a) the ordinance was not content oriented since it related to all outdoor advertising, (b) the ordinance served significant governmental interests of traffic safety and aesthetics, and (c) the ordinance left open adequate alternative means of communication. Recognizing that other forms of communication could be "subjected only to narrowly drawn regulations serving a compelling governmental interest"—a test it did not suggest San Diego could come close to meeting in the instant case—the court held the cases setting forth such principles not to be "controlling." (JS 24a) In distinguishing numerous other means of communication which it (and this Court) had held were protected by the First Amendment, the court concluded that unlike all other means of communication, billboards constituted totally unprotected speech because they were "large, immobile, and permanent." (JS 24a) The court significantly relied on this Court's decision in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) in support of its ruling. (JS 24a-25a)

Justice Clark dissented, concluding that the statute "clearly prohibits expression of political, social and commercial thought." (JS 52a) His opinion pointed out that the majority had relied upon a number of cases decided prior to the rulings of this Court affording protection to commercial speech (JS 53a);* that the majority had mis-

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* *Markham Advertising Co.* v. *State*, 73 Wash.2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969); *Murphy, Inc.* v. *Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944); *Cromwell* v. *Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); *Howard* v. *State Dep't of Highways*, 478 F.2d 581 (10th Cir. 1973); *United Advertising Corp.* v. *Borough of Raritan*, 11 N.J. 144, 152, 93 A.2d 362, 366 (1952).

read and misperceived this Court's summary dismissal in *Suffolk* (JS 54a, n.1) and that the majority had improperly relied upon a number of entirely distinguishable cases involving billboards. (JS 55a)

Outdoor advertising, Justice Clark concluded, was entitled to First Amendment protection just as were other forms of expression. (JS 55a-58a) The majority opinion, Justice Clark argued, had failed to show that the governmental interests in aesthetics and traffic safety "outweigh[ed] First Amendment rights of plaintiffs, advertisers and the viewing public." (JS 58a) And, relying on the precise terms of the Joint Stipulation of Facts and on other materials, Justice Clark concluded that "[a]dequate alternative means of dissemination of speech are not available." (JS 60a)

Justice Richardson concurred in the judgment, sharing "some of the substantial doubts raised by the dissent of Justice Clark" (JS 48a) but believing himself bound by this Court's summary dismissal in *Suffolk*.

Justice Newman concurred, as well, but noted that he too "share[d] Justice Richardson's unease regarding the prohibition that Justice Clark finds illegal" (JS 48a) and was "not persuaded that this court should defer to city officials' views that one mode of communication in the city should be outlawed because it seems 'particularly unsightly and intrusive'." (JS 49a) However, and notwithstanding his view that "[t]he ordinance here ought to be redrafted" (JS 50a), Justice Newman joined the judgment.

Summary of Argument

The municipal ordinance in question on this appeal would, if enforced, totally destroy the outdoor advertising business in San Diego. That, as the parties have stipulated, is its purpose and that would be its effect. This would occur, notwithstanding the fact that outdoor advertising is a long-recognized and distinct medium of communication which, as the parties have also agreed, is relied upon by many who find other means of communication insufficient, inappropriate and prohibitively expensive.

Part I of this brief outlines the nature of outdoor advertising as a distinct medium of communication; the stipulation of the parties to that effect; the conclusion of Congress to the same effect; and the historical role of the medium. It then urges that, although each medium of communication "must be assessed for First Amendment purposes by standards suited to it," *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 557 (1975), this Court has never countenanced the total destruction of a medium. Cases involving other media are considered and the general conclusion urged that the First Amendment protects the ability of each speaker to choose the medium best suited to his needs.

The decision of *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977) is specifically relied upon for its holding that, even in the purely commercial speech area (an area afforded less protection than that at issue here), those who wish to speak via one medium may not be deprived of the opportunity to do so in the absence of satisfactory alternatives. In light of the stipulation of the parties that such satisfactory alternatives are lacking here, reversal is urged on this ground as well.

Two arguments of the California Supreme Court are then considered and demonstrated to be inadequate. The contention that outdoor advertising may be destroyed on the ground that it is commercial speech is refuted on the ground that (a) the parties have stipulated that it is, as well, significantly non-commercial in nature and (b) that, in any event, San Diego has utterly failed to meet the standards set forth by this Court in *Central Hudson Gas & Electric Co.* v. *Public Service Commission,* 100 S.Ct. 2343 (1980) which govern such cases. And the purported reliance on a time, place and manner test by the California Supreme Court is responded to by demonstrating (a) that it is a test which, at least as interpreted by the California court, is inherently ill-suited to cases involving the total destruction of a medium and (b) that, even under appropriate time, place and manner analysis the San Diego ordinance cannot be sustained.

Part II of the brief urges that the police power of San Diego does not go nearly so far as to permit an ordinance to destroy this 60 year old communications business. It is first demonstrated that where the loss of constitutional rights is at risk, the exercise of the police power is scrutinized with special care by the courts, the state being obliged to demonstrate a significant public interest furthered by narrowly drawn regulations specifically tailored to accomplish the legislative goal. The special disfavor with which absolute prohibitions are viewed is then explored. The two governmental interests cited in support of the ordinance—traffic safety and aesthetics—are then considered. The failure of San Diego to meet its burden with respect to the first issue is discussed, as is the fact that the record lends no support at all to the thesis that billboards cause traffic accidents. The considerable perils of reliance on the mere invocation of aesthetics to overcome

constitutional values are then considered, as is the utter failure of San Diego to draft a narrow instead of a blunderbuss ordinance.

ARGUMENT

I

The Total Ban on the Medium of Outdoor Advertising Is Violative of the First Amendment.*

At issue on this appeal is the total "elimination", as the parties have stipulated, of a "forum for the communica-

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* There is a suggestion in the majority opinion of the California Supreme Court that appellants lack standing to assert that the San Diego ordinance is facially unconstitutional. (JS 23a, n.14) In fact, both the loss of their right freely to disseminate information and the economic harm appellants will suffer as a result of the ordinance amply afford the requisite "personal stake in the outcome of the controversy" to meet this Court's tests of standing. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). As was true of the book publishers in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), who were seriously affected by a statute effectively coercing distributors to cease the distribution of certain books, appellants will suffer "a palpable injury as a result of the [respondent's] acts alleged to violate federal law. . . ." *Id.* at 64 n.6. And since appellants assert their own right to circulate information (*see Bantam Books, Inc.* v. *Sullivan, supra; Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938)), the requirement that a petitioner "assert [its] own legal rights and interests," *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), has also been met.

Indeed, even in the absence of the direct interest present here, this Court has been so solicitous of free expression rights as to permit "a litigant whose own activities are unprotected . . . [to] challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *Grayned* v. *City of Rockford*, 408 U.S. 104, 114-21 (1972); *Lovell* v. *Griffin*, 303 U.S. 444, 451 (1938); *Schneider* v. *State*, 308 U.S. 147, 162, 165 (1939); *see also Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-13 (1973); *Bigelow* v. *Virginia*, 421 U.S. 809, 815-17 (1975).

Were there any question whatever as to appellants' standing to challenge the ordinance on its face, it would be laid to rest by

tion of messages to the public," a "means of communication and a media for the expression of ideas." (JS 120a, 123a, 126a, ¶¶ 2, 21, 22(c), 29) The parties to the litigation are not alone in so describing outdoor advertising. Outdoor advertising has been characterized by the United States Congress as one of the nation's separate and distinct "communications media" in the Federal Campaign Communications Reform Act, 47 U.S.C. § 801(1) (repealed 1974). *See also* Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, 441d (Supp. III 1979).

Signs and billboards have, in fact, been a recognized means of communication for centuries.* Throughout

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application of the "pragmatic considerations" this Court has articulated, in resolving such questions, particularly the impact of the litigation on third party interests. *See Bantam Books, Inc.* v. *Sullivan, supra; Eisenstadt* v. *Baird*, 405 U.S. 438, 445-46 (1972). The California Supreme Court questioned appellants' standing to challenge the inadequacy of alternative means available to various advertisers, stating that such challenges should be brought by the advertisers themselves. (JS 23a, n.14) Such a view ignores, among other things, the stipulated facts which govern this case. As the stipulation states: "Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (JS 126a, ¶ 28) To suggest that individual advertisers who may be using one or two signs at a time and who do so precisely because other media are too expensive should be looked to to wage what are likely to be long and costly litigations to vindicate their right to advertise on billboards is to close one's eyes to reality. This is particularly so when even a successful "as applied" challenge by an advertiser, as suggested by the California Supreme Court, could do no more than permit the advertiser to erect and maintain a billboard at his own expense, bearing all capital and real estate costs, since currently existing billboards, under the California Supreme Court's decision, likely would long since have been removed.

* Ancient Egyptian obelisks, and even the famous Rosetta Stone carried advertising messages. Agnew, *Outdoor Advertising* ch. 2 (McGraw-Hill Book Co. 1938). In Pompeii, billboard messages were found on "nearly every wall"; similar messages, buried by

American history, billboards have been used as a significant means of expression and communication. *See,* Davidson, *Propaganda and the American Revolution* (Univ. of No. Carolina Press 1941). During the Civil War, the United States Government itself "was one of the heaviest outdoor advertisers" conveying its message with posters "calling for volunteers and offering large bounties" in places which other advertising had been unable to reach. F. Presbrey, *The History and Development of Advertising* 501 (Doubleday, Doran & Co. 1929). In World War I, posters urged upon the public the advisability of American participation. *See* M. Curti, R. Shyrock, T. Cochran & F. Harrington, *An American History* 364 (Harper & Bros. 1950). World War II posters publicized war bonds and requested blood donations. Later social and political uses ranged from the extremely successful "Smokey the Bear" advertisements to those illustrated by the photographs set forth as Appendix I to the Jurisdictional Statement. *See generally* R. Henderson & S. Landau, *Billboard Art* (Chronicle Books 1980) [hereinafter referred to as "Henderson & Landau"].

Commercial billboard advertising began spontaneously in the American colonies with the itinerant sign painter and poster printer practicing his craft learned in England. As one commentator described the phenomena:

> "Notices of sale of farm stock and equipment, county and state fairs, theatricals, circuses, horse races, Fourth of July celebrations, carnivals, and medicine shows constituted the early patrons of the industry.

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the Vesuvius eruptions in 79 A D., called on voters to end graft and corruption. R. Henderson & S. Landau, *Billboard Art* 9 (Chronicle Books 1980). *See generally R. Claus & K. Claus, Visual Environment* (Collier-McMillan Canada Ltd. 1971); M. Gallo, *The Poster as History* (New American Library 1974); Larwood & Hetter, *The History of Signboards* (1866).

> . . . Even though outdoor advertising in the United States had developed without plan or purpose it was so effective that by the close of the War Between the States, there were 275 bill-posting firms employing from two to twenty men each." Tocker, "Standardized Outdoor Advertising: History, Economics and Self-Regulation," in *Outdoor Advertising: History and Regulation* 26-29 (J. Houck ed., University of Notre Dame Press 1969).

Through the years, the nature of commercial advertising on billboards has varied and changed with the times. By 1905, New York was the setting for world-famous electrical advertisements on what was already referred to as The Great White Way; by the late 1920's, with the advent of far better roads and automobile tires than had previously been available, billboards began to be visible throughout the nation. Burma Shave signs, fondly recalled by automobile drivers and their families of the 1930's and 1940's, became a part of American folklore. In the 1950's, hand-painted billboards began appearing with increasing frequency. And, in the years that followed, billboards have continued to reflect and influence American life. *See generally,* Henderson & Landau, *supra.*

The banning of so distinct and historically rooted a medium of communication is inconsistent with a wide range of rulings of this Court relating to other modes of communication. Forms of media differ and, based on their differences, have been treated differently by the courts. Because of the limits of the broadcast spectrum, radio and television have been afforded, in narrow and specified respects, some less protection than the print press. *Compare, Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969) *with Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241

(1974). Motion pictures, while "within the free speech and free press guaranty of the First and Fourteenth Amendments" (*Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 502 (1952)), have been subject to official scrutiny prior to public exhibition in a fashion which would be constitutionally intolerable if applied to other media (*Times Film Corp.* v. *City of Chicago,* 365 U.S. 43 (1961)). But each medium has been accorded significant, if not always equivalent, protection.

What these and other cases reflect was succinctly distilled by the Court in *Southeastern Promotions Ltd.* v. *Conrad,* 420 U.S. 546, 557 (1975): "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problem." Whatever "problems" each distinct medium of communication may pose—and we do not doubt that outdoor advertising raises certain problems unique to it—the one approach uniformly rejected by this Court is that followed by the California Supreme Court in this case: one which recognizes no First Amendment value whatever in the very existence of the medium. The adoption of this approach by the California Supreme Court itself compels reversal.

When analyzing municipal restrictions on leafletting, for example, this Court has presumed distinct value in the medium—precisely what, in fact, the parties have stipulated to as to outdoor advertising. (JS 123a-126a, ¶¶ 21, 22, 23, 28) In *Lovell* v. *City of Griffin,* 303 U.S. 444, 452 (1938), the need to protect leafletting led to the conclusion that the town of Griffin, Georgia could not impose a conditional ban by requiring that an individual obtain a license prior to distribution. In *Schneider* v. *State,* 308 U.S. 147 (1939), absolute bans on handbill distribution were held

unconstitutional notwithstanding claims of municipalities that the aim of the legislation was the prevention of littering. Again, in *Jamison* v. *Texas,* 318 U.S. 413 (1943), this Court decided first that constitutional protection extended to a medium—"the communication of ideas by handbills." *Id.* at 416. It then concluded that "[t]he right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances." *Ibid.**

The same logic has guided the Court when other methods of distributing constitutionally protected information were threatened. In *Martin* v. *City of Struthers,* 319 U.S. 141 (1943), Justice Black isolated those factors which make door-to-door solicitation a protected medium—the fact that "[f]or centuries it has been a common practice"; "[t]he widespread use of this method of communication by many groups"; and its availability and importance to diverse individuals, from those involved with "poorly financed causes" to the government, to convey a variety of ideas. *Id.* at 141, 145-46. A flat prohibition on such solicitation was held unconstitutional. *Accord, Troyer* v. *Town of Babylon,* 483 F.Supp. 1135, 1138 (E.D.N.Y.), *aff'd mem. sub nom. Troyer* v. *Town of Southampton,* 628 F.2d 1346 (2d Cir.), *aff'd,* 49 U.S.L.W. 3371 (U.S. November 17, 1980) ("the Constitution does not allow government to create a rebuttable presumption that people do not wish to be exposed to a particular class of ideas, or mode of expression.")

Again in *Saia* v. *New York,* 334 U.S. 558 (1948), the Court described the unique qualities of sound trucks as a medium—their importance and acceptance as a means of communication. The Court observed that:

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* *See also Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 518 (1939), in which the Court found an "ordinance absolutely prohibiting such distribution is void."

> "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached." *Id.* at 561.

The Court then concluded:

> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas." *Id.* at 562.

One year later, in *Kovacs* v. *Cooper,* 336 U.S. 77 (1949), a divided Court affirmed the conviction of an individual for operating a "loud and raucous" sound truck. Although no opinion commanded a majority of the Court, three members of the majority observed that an "[a]bsolute prohibition" on sound trucks was "probably unconstitutional" (*id.* at 81-82), and three others, concluding that the statute in fact constituted just such "an absolute and unqualified prohibition" of sound trucks, dissented on that ground. *Id.* at 101.*

All of these cases share the common premise that the evident differences between means of communication can neither be ignored nor underestimated; not only is the medium itself sometimes the message,** but the form of

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* Recently, the holding in *Kovacs* was characterized as permitting "the decibels emitted by a sound truck [to] be regulated consistently with the First Amendment. . . ." *Buckley* v. *Valeo,* 424 U.S. 1, 18 n.17 (1976) (*per curiam*). *See also Wollam* v. *City of Palm Springs,* 59 Cal.2d 276, 282-83, 379 P.2d 481, 485, 29 Cal.Rptr. 1, 5 (1963); *Maldonado* v. *County of Monterey,* 330 F.Supp. 1282, 1285 (N.D. Cal. 1971); Recent Cases, 62 Harv.L. Rev. 1228, 1229 (1949).

** *See* M. McLuhan & Q. Fiore, *The Medium is the Message* (Penguin Books 1967); Kaufman, *The Medium, The Message and the First Amendment,* 45 N.Y.U.L. Rev. 761 (1970).

the message can often affect its chance of being presented or accepted in the political, social and commercial marketplace. Consequently, since "words are often chosen as much for their emotive as their cognitive force," *Cohen* v. *California*, 403 U.S. 15, 26 (1971), this Court has g[illegible]rded the speaker's choice of what he considers the most effective means for his communication. The speaker must have the opportunity to "reach the minds of willing listeners and to do so there must be opportunity to win their attention," *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949). And for each speaker, a variety of factors, including financial constraints,* desired audience, and the message itself, combine to lead to the choice of a specific medium. In San Diego, this choice may lead police seeking higher pay to greet visitors with a billboard stating "Welcome to San Diego—Home of 1100 Underpaid Cops." (JS Appendix I) It may lead one group to propose by a billboard a boycott of Shell (*id.*), another to seek United States withdrawal from the United Nations (*id.*). There are, to be sure,

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* As the stipulated fact that outdoor advertising is relied upon because other forms of advertising are "prohibitively expensive" indicates (JS 125a-26a, ¶ 28), outdoor advertising is the least expensive of the mass media for advertisers. For the year 1978, for example, the average cost per "rating point" in San Diego for some of the media as publicly set forth in a standard reference guide for advertisers, was as follows: for 30-second commercials on prime-time television, $65.00, and on spot television $38.00; for 30-second commercials on spot radio, $28.00; for one page, black and white ads in weekly magazines, $83.00; for four color ads in monthly magazines, $93.00; and for 600-line newspaper advertisements, $25.00. The average cost per rating point in San Diego for outdoor advertising for a standard, large scale showing for thirty days was, during the same time period, $6.00. "Cost per rating point" is a computation that relates costs to rating point levels—*i.e.*, a percentage indicating the proportion of a particular audience reached by a medium in a particular time frame—and is used by media planners as an indication of relative media efficiency. *Media Market Guide*, San Diego Market Section at 233 (Summer 1978).

other ways to communicate. But they are not the same. For these speakers—and the multitude of commercial users of outdoor advertising—it is no exaggeration to say that there is no meaningful alternative.

It is thus no answer to the constitutional protection afforded each distinct medium simply to assert, as did the majority opinion of the California Supreme Court, that some other medium may be substituted for the one at issue. In *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977), a case involving more limited First Amendment rights than are involved here because of the totally commercial context of the speech at issue there, the Court, dealing with a town ordinance that prohibited the posting of real estate "For Sale" and "Sold" signs, found that "serious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication'. . . ." *Id.* at 93. The Court concluded:

> "[A]lthough in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than 'For Sale' signs; cf. *Martin* v. *City of Struthers*, 319 U.S. 141, 146 (1943), *Kovacs* v. *Cooper, supra*, at 102-103 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States* v. *O'Brien*, 391 U.S. 367, 388-389 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold, cf. *Cohen* v. *California*, 403 U.S. 15, 25-26 (1971).

> The alternatives, then, are far from satisfactory." * *Ibid.*

Other courts have, following *Linmark,* ruled similarly. *See In re Koffler,* —— N.Y.2d ——, N.Y.L.J. Oct. 23, 1980, p. 1, col. 2 at p. 4, col. 4 (holding "ample alternative channels" to direct mail advertising by lawyers unavailable in absence of proof by the state of "comparative costs of the suggested alternatives" or that "the more direct and discursive letter form is not more effective");** *People* v. *Mobil Oil Corp.,* 48 N.Y.2d 192, 397 N.E.2d 724, 422 N.Y.S.2d 33 (1979) (holding ordinance barring posting of signs advertising gasoline price unconstitutional due to lack of sufficient alternative channels for expression).

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* Years prior to this Court's *Linmark* ruling, the California Supreme Court had itself recognized the constitutional dubiety of equating one means of communication with another. In *Wollam* v. *City of Palm Springs,* 59 Cal.2d 276, 284, 379 P.2d 481, 486, 29 Cal.Rptr. 1, 6 (1963), it observed that sound trucks may be, in certain circumstances, the "only practical means for communication of opinion [since] alternative modes of communication, such as radio or television, may be prohibitively expensive, not available, or not effective."

The *Wollam* language is almost identical with that stipulated to by the parties—*i.e.,* that "[m]any businesses and politicians and other persons" rely on outdoor advertising because other media are "insufficient, inappropriate and prohibitively expensive." (JS 126a, ¶ 28) The transformation of this stipulated language by the California Supreme Court to

> "[t]he *possibility* that the ordinance *may* impede an *occasional* advertiser from communicating his message" (JS 23a n.14; emphasis added)

is suggestive of the cavalier fashion with which the binding terms of the stipulation were treated throughout the opinion. *See* JS 60a-61a (opinion of Clark, J., dissenting).

** In *Koffler,* the New York Court of Appeals also observed that "unless the reasonableness of regulation is to be considered in the abstract, a regulation which completely proscribes use of direct mail when the state's purpose can readily be achieved by a less restrictive alternative cannot be said to be reasonable." (*Id.* at p. 4, col. 4)

Nonetheless, the California Supreme Court sanctioned the complete destruction of the medium of outdoor advertising in San Diego. It appears to have bottomed its approach on two distinct premises: first, the thought that only commercial speech was involved here and, second, the notion that the ordinance could be justified as a valid time, place and manner regulation. Neither basis can be sustained.*

The Ordinance Cannot Be Sustained as a Proper Regulation of Commercial Speech

To the extent the ruling was based upon the views of the California court as to the limited protection afforded commercial speech, the opinion simply misses the mark. In this action, as Justice Clark's dissent observes, "the issue before us is not the scope of permissible regulation of commercial thought." (JS 51a) In fact, the stipulation of the parties conclusively establishes that outdoor advertising in San Diego contains "[v]aluable commercial, political and social information." (JS 125a-26a, ¶ 28) Any attempt to support the total "elimination" of outdoor advertising on the ground that all such advertising is commercial is thus based on a conceded inaccuracy.

Moreover, as this Court has recently made clear beyond peradventure, even totally commercial speech, such as that involved in *Linmark,* may not be suppressed unless:

> "[t]he limitation on expression [is] designed carefully to achieve the State's goal. Compliance with this re-

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* These bases apparently were set forth by way of exploration of the permissible reach of the ordinance under the California Constitution's guarantee of free speech, since the California Supreme Court eschewed a First Amendment analysis as such in light of its conclusion, based on a misapprehension of this Court's dismissal of certain billboard appeals, that the case no longer presented an "arguable issue" as to the First Amendment. (JS 20a) *See generally* p. 12, n.**, *supra.*

> quirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Central Hudson Gas & Electric Co.* v. *Public Service Commission,* 100 S.Ct. 2343, 2350 (1980).

The Court further concluded that limitations on commercial speech may be "no more extensive than necessary to further the State's interest," *id.* at 2353, and consequently held unconstitutional an order barring "all promotional advertising, regardless of the impact of the . . . service on overall energy use." *Ibid.*

The language of the Court in *Central Hudson* is, in and of itself, utterly inconsistent with the ruling below. Regulations that flatly ban *all* outdoor advertising—even if all of it were commercial—can hardly survive a legal test which demands that regulation of even commercial speech be shown to be "no more extensive than necessary." San Diego has not sought to bar particular billboards which might be urged to be safety hazards because of their placement; it has not sought to regulate, for aesthetic reasons, the location or concentration of billboards within San Diego's industrial and commercial zones where they currently exist. It has, instead, resorted to the very blunderbuss technique condemned by this Court in *Central Hudson.**

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* Even the case most strongly relied upon in this respect by the majority opinion of the California Supreme Court suggests precisely the opposite conclusion than that for which it is cited.

The Ordinance May Not Be Justified as a Proper Regulation of the Time, Place and Manner of Speech

Reliance by the California Supreme Court on time, place and manner analysis is similarly unsound. To urge that the destruction of a medium can be justified by the simple invocation of the standard tripartite time, place and manner test—content neutral regulation in furtherance of significant governmental interests with ample alternative sources of communication available*—is to ignore the fact that, given the logic of the California opinion, the elimination of any medium could be sanctioned by application of such a test. Any effort to destroy an entire medium could be viewed as content neutral; arguably "significant" governmental interests abound; alternative sources may, by the hypothesis of the opinion below, always be found in the media which remain—*i.e.*, those not "eliminated". If a state sought to prohibit sound trucks, it could be urged that such abolition was content neutral, supported by the significant interests of avoiding noise and enhancing personal privacy, and that alternative sources of expression—such as leaflets or outdoor advertising—were available. If all leaflets were sought to be banned on one aesthetic theory or another, the presence of "other" means of communication could be cited. Precisely the same could

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Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) is cited and relied upon for the proposition that "the city's interest in regulating commercial use of real property outweighed the incidental effect of the ordinance upon First Amendment values." (JS 24a-25a) The opinion totally overlooks the fact that *Young* involved simply a *spacing* regulation—precisely the form of regulation rejected by San Diego in favor of prohibition. *See infra*, pp. 37-38.

* *See, e.g., Consolidated Edison Co.* v. *Public Service Commission*, 100 S.Ct. 2326, 2332 (1980); *Police Department* v. *Mosley*, 408 U.S. 92 (1972).

be said in support of the banning of any medium of communication—until it were the last.*

Moreover, from the face of the San Diego ordinance and the terms of the stipulated facts of this case, the ban at issue here cannot survive any proper application of time, place and manner analysis. For one thing, the parties themselves have stipulated that one element of the classic time, place and manner test cannot be met: there are *no* adequate alternative means of serving the "many businesses and politicians and other persons" whose needs are served only by outdoor advertising and who find other means of advertising "insufficient, inappropriate and prohibitively expensive." (JS 126a, ¶ 28) A review of Appendix I to the Jurisdictional Statement suggests the accuracy of the stipulation.**

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* Professor Ely has pointed out that channels of communication cannot be closed, even in the interest of significant state concerns and even by way of content neutral regulations:

> "the state's interest in keeping the streets and sidewalks clear cannot constitutionally be served by outlawing the distribution of handbills. Here neutrality—an absence of any special restrictions on expression—is not good enough. The state is obligated to protect the channels of communication, even if it takes a special exception and some sacrifice of the state's expression-unconnected interest in clean cities to do it. That there must be some such affirmative obligations is clear. Were the constitutional requirement simply one of neutrality toward expressive conduct, channels of communication such as pamphleteering, picketing and public speaking could effectively be closed altogether, given the state's undeniable interests in keeping thoroughfares clear, and controlling crowds, noise and litter." Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1335-36 (1970).

** In that respect, we commend to the Court the "Brief in Support of Jurisdictional Statement Filed by *Amici Curiae* Who Rely on Outdoor Advertising to Communicate." That brief, joined in by such diverse entities as the California Avocado Commission, the Sheriffs of Los Angeles and San Diego, the First Church of God and the Sickle Cell Anemia Research & Education, Inc., illustrates the absence of adequate alternate means of communication—a fact

The San Diego ordinance, furthermore, can hardly be said to be content neutral. It discriminates on the basis of content by exempting both on-site signs and signs relating to specified subjects—*e.g.*, premises for sale, rent or lease. In effect, only those who own land may use signs to communicate and they are explicitly limited in what they may say. A landowner may advertise products or services which he creates or makes available on those premises; but he may not use signs to advertise those products or services elsewhere, he may not use his own property to advertise the products or services of others, and he may not even use signs on his own land to express his own views on matters not related to his products or services. The difference between the prohibited and the permitted is thus not based upon some content neutral criteria such as size, shape or location; it is strictly based, as it may not be, on content.

As for the governmental interests asserted, the record of this case is utterly barren of *any* support for the proposition that traffic safety has been adversely affected by the existence of outdoor advertising. *See infra,* at pp. 41-43. As for aesthetic considerations (a matter dealt with more extensively at pp. 43-45, *infra*), we need say no more now than that governmental concerns at least as significant have been held insufficient to overcome First Amendment interests. *See, e.g., Linmark Associates, Inc.* v. *Township of Willingboro, supra.* Indeed, if the mere assertion of aesthetic considerations could overcome the First Amendment rights of a medium of communication, more than a few media would be imperiled. Leaflets litter; sound trucks are noisy; newsracks are sometimes unsightly; door-to-door solicitors may well be as intrusive as they are un-

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to which San Diego has stipulated. Of particular interest may be examples of speech which other media refused to carry, but which were set forth on billboards. *E.g., id.* at 5, 7.

welcome. The First Amendment may not be so easily overcome.

II

The Police Power of the City of San Diego May Not Be Interpreted Consistently With the Constitution to Authorize the Complete Prohibition of Outdoor Advertising.

Quite apart from the failure of the California Supreme Court to take account at all of the First Amendment interest in protecting distinct media of communications, itself a sufficient basis for reversal, the ordinance in question could not pass the most rudimentary test applied to assess the propriety of an exercise of the police power which, in destroying a legitimate business, diminishes the breadth and scope of public expression.

Under the decision of the California Supreme Court, a long-standing legitimate business will be "eliminated" across the entirety of San Diego's three hundred and twenty square miles. (JS 120a, 126a, ¶¶ 2, 5, 29, 30) As the parties have stipulated, prior to the enactment of Ordinance No. 10795 outdoor advertising had been conducted in full compliance with all applicable municipal and state laws (JS 122a, ¶ 15) at substantial cost to appellants. (JS 122a, 123a, ¶¶ 16, 18) All of the appellants' billboard displays in San Diego are located in areas zoned for commercial and industrial uses (JS 123a, ¶ 20) and the displays are thus a critical link in the dissemination of goods and services within areas which San Diego itself has zoned for such purposes. Almost sixty per cent of San Diego's citizens are occupied in the manufacturing, retailing, or providing of services (JS 121a, ¶ 10) and San Diego has

itself agreed that the outdoor advertising business provides both direct and indirect benefits to the flow of trade and commerce. (JS 125a-26a, ¶¶ 27, 28) It is in the face of this barrage of stipulated facts, on a record devoid of evidence before this or any other Court that such a flat prohibition is necessary for the accomplishment of any asserted legislative goal, that this case arises.

The police power of the state is broad. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962). It is, of course, subject to limits under the due process clause and other provisions of the federal Constitution. While the California Supreme Court recognized that certain limitations exist, its analysis of the proper limits of the police power was fatally flawed in three distinct respects: it failed, as we have indicated, to give proper recognition to First Amendment considerations and thus incorrectly held that the ordinance carried with it a presumption of constitutional validity; it attached no weight whatsoever to the fact that the effect of the ban at issue here is the total elimination of a decades-old business; and it refused even to consider whether the scope of the ordinance was necessary to accomplish San Diego's asserted goals.

The California Supreme Court held that the standard for judging this legislation was simply whether it sought to accomplish "proper objectives" and, if so, whether the San Diego City Council "could reasonably" believe the instant ordinance would advance those objectives. (JS 6a-7a) Focusing on the two principal interests put forward in the ordinance's preamble—"the elimination of traffic hazards" and the "improvement of the appearance of the City" (JS 7a)—the Court held both traffic safety and aesthetics to be goals properly within the police power of the City. (JS

7a, 9a) It also held "as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets reasonably relates to traffic safety." (JS 7a) It did so without citing anything in the record even suggesting a correlation between the existence of billboards and the incidence of traffic accidents.

Whatever the validity of such an approach to judicial review where narrowly-drawn statutes without impact on distinct constitutional concerns may be involved, this approach can have no application here. This Court has consistently made clear that a state's exercise of the police power must withstand a more exacting review where constitutional values are at issue. *See, e.g., United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 25-26 (1977) (requiring more exacting scrutiny when the contract clause is implicated); *Carey* v. *Population Services International,* 431 U.S. 678 (1977) (requiring more exacting scrutiny when the right to privacy is implicated); *Shelton* v. *Tucker,* 364 U.S. 479 (1960) (requiring more exacting scrutiny when associational freedoms are implicated); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) (requiring more exacting scrutiny when religious freedoms are implicated). Again and again, this Court has required such a higher standard when interests such as those at issue here are at stake. As this Court stated in *Schneider* v. *State,* 308 U.S. 147, 161 (1939):

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

Throughout the years, this Court has articulated the required standard in a variety of ways, in a variety of con-

texts, and in cases involving a variety of proffered governmental interests. What has remained constant, however, has been the Court's insistence that to justify a challenged exercise of the police power in the light of competing constitutional concerns, the reviewing court may not rely on any presumption of validity, but rather must require the *state* to demonstrate a significant public interest, furthered by a narrowly-drawn regulation, specifically tailored to accomplish the legislative goal; should less restrictive means be available, the effort must fail. *See, e.g., Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 1162 (1980) (state action cannot be sustained unless it serves a sufficiently strong subordinating interest which cannot be served by less destructive means); *Consolidated Edison Co.* v. *Public Service Commission,* 100 S.Ct. 2326, 2334 (1980) (state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest); *Carey* v. *Population Services International,* 431 U.S. 678 (1977) (state interest can only be accomplished by narrowly-drawn statutes furthering compelling state interests). *See also Troyer* v. *Town of Babylon,* 483 F.Supp. 1135 (E.D. N.Y.), *aff'd mem. sub nom. Troyer* v. *Town of Southampton,* 628 F.2d 1346 (2d Cir.), *aff'd,* 49 U.S.L.W. 3371 (U.S. November 17, 1980).

Still more exacting scrutiny is mandated in this case for a separate and distinct reason: the San Diego ordinance is not a mere regulation but an absolute prohibition. This Court has often exhibited its distrust of any such all-encompassing exercise of the police power (*see Talley* v. *California,* 362 U.S. 60 (1960); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Lovell* v. *City of Griffin, supra;*

Schneider v. *State, supra; Saia* v. *New York, supra*).* This very real distinction between regulation and flat prohibition was explicitly recognized in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the decision so heavily —and, we think, wrongly—relied on by the California Supreme Court. In that decision, both the plurality opinion of Mr. Justice Stevens and the concurring opinion of Mr. Justice Powell noted that the Detroit zoning regulation at issue there was not a flat prohibition on the operation of adult movie theatres within the city. Upholding the ordinance, Mr. Justice Stevens, writing for the plurality, cautioned that:

> "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. at 71, n.35.

Mr. Justice Powell emphasized, as well, throughout his opinion the fact that the zoning ordinance in question was one that "merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films. . . ." *Id.* at 81 n.4. But it is precisely such a reduction—in this case to

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* This line of cases was relied upon by the Court of Appeals for the Second Circuit in reversing the dismissal of a challenge to a regulation which prohibited the distribution of newspapers in New York City subways except through licensed newsstands:

> "once appellants have shown a protected interest in speech under the first amendment it is incumbent upon the governmental authority to prove that there is a compelling state interest in its total ban. *Lovell* v. *Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Cox* v. *Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). This puts the burden on the governmental authority to establish that nothing less than a total ban would serve this compelling state interest." *Wright* v. *Chief of Transit Police*, 558 F.2d 67, 68 n.1 (2d Cir. 1977).

zero—which is the intended and inevitable result of the San Diego ordinance.

Over the years, state courts, as well, have resisted the notion that the flat prohibition of a business is consistent with the due process clause absent any showing that the activity in question constituted a nuisance *per se*. The Pennsylvania Supreme Court articulated these special concerns in *Exton Quarries, Inc.* v. *Zoning Board of Adjustment*, 425 Pa. 43, 59-60, 228 A.2d 169, 179 (1967):

> "The constitutionality of zoning ordinances which totally prohibit legitimate businesses . . . from an entire community should be regarded with particular circumspection; for unlike the constitutionality of most restrictions on property rights imposed by other ordinances, the constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community. . . . [A] zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality."

These principles have been applied to set aside various prohibitions on business activities*—including total bans

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* Among the Pennsylvania cases adopting the rationale of the *Exton Quarries* decision are the following, in each of which a flat prohibition on a particular business was rejected: *Beaver Gasoline Co.* v. *Zoning Hearing Board*, 445 Pa. 571, 575-77, 285 A.2d 501, 504-05 (1971) (total ban on gasoline stations; municipality not entitled to rely on presumption of validity of zoning ordinance); *Daikeler* v. *Zoning Board of Adjustment*, 1 Pa. Cmwlth. 445, 452-

on billboards.* They reflect a recognition of what was aptly expressed by the Court of Appeal in the instant case:

53, 275 A.2d 696, 698-99 (1971) (blanket prohibition on off-site advertising signs); *see Norate Corp.* v. *Zoning Board of Adjustment,* 417 Pa. 397, 207 A.2d 890 (1965) (prohibition of all off-site advertising signs); *Appeal of Girsh,* 437 Pa. 237, 263 A.2d 395 (1970) (township-wide exclusion of multiunit apartment buildings); *Appeal of Olson,* 19 Pa. Cmwlth. 514, 338 A.2d 748 (1975) (prohibition of townhouses); *General Battery Corp.* v. *Zoning Hearing Board,* 29 Pa. Cmwlth. 498, 371 A.2d 1030 (1977) (complete ban on waste disposal facilities).

The strict approach towards flat prohibitions is reflected in decisions of other states which have struck down such prohibitions as unreasonable and arbitrary. *U.S. Mining and Exploration Natural Resources Co.* v. *City of Beattyville,* 548 S.W.2d 833, 834 (Ky. 1977) (city-wide exclusion of coal tipples; test is "whether the prohibition of a particular business is necessary to prevent infliction of a public injury"); *Gust* v. *Township of Canton,* 342 Mich. 436, 70 N.W.2d 772 (1955) (prohibition of trailer camps); *Bzovi* v. *City of Livonia,* 350 Mich. 489, 87 N.W.2d 110, 111-12 (1957) (absolute ban on drive-in theatres); *People ex rel. Trust Co. of Chicago* v. *Village of Skokie,* 408 Ill. 397, 97 N.E.2d 310 (1951) (flat prohibition on drive-in theatres had "no firm basis in or relationship" to public welfare); *Reynolds* v. *Vulcan Materials Co.,* 279 Ala. 363, 185 So.2d 386 (1966) (complete prohibition on rock-crushing); *Carter* v. *Town of Palm Beach,* 237 So.2d 130 (Fla. 1970) (elimination of surf-boarding); *Town of Conover* v. *Jolly,* 277 N.C. 439, 177 S.E.2d 879 (1970) (total ban on mobile homes); *Frecker* v. *City of Dayton,* 88 Ohio App. 52, 63, 85 N.E.2d 419, 424 (1949), *aff'd,* 153 Ohio St. 14, 90 N.E.2d 85 (1950) (*per curiam*) (prohibition on sale of ice cream products in parks and on public ways; "no evidence that prohibition as distinguished from regulation is essential to the public welfare"); *Township of Andover* v. *Lake,* 89 N.J. Super. 313, 214 A.2d 870 (App.Div. 1965) (total elimination of junkyards); *Oak Forest Mobile Home Park, Inc.* v. *City of Oak Forest,* 27 Ill.App.3d 303, 326 N.E.2d 473 (1975) (noting that an absolute prohibition of mobile homes is not entitled to presumption of validity).

* Flat prohibitions on billboards have frequently been held to be an unreasonable exercise of the police power: *Combined Communications Corp.* v. *City and County of Denver,* 189 Colo. 462, 542 P.2d 79 (1975); *Norate Corp.* v. *Zoning Board of Adjustment,* 417 Pa. 397, 207 A.2d 890 (1965); *Central Advertising Co.* v. *City of Ann Arbor,* 391 Mich. 533, 551, 218 N.W.2d 27, 35 (opin-

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"The ordinance is too broad, too general and too inclusive." (JS 80a) As the Colorado Supreme Court has noted, "the prohibition of an entire industry throughout the entire area of a major city" is of a different character than limitations or prohibitions in small residential communities. *Combined Communications Corp.* v. *City and County of Denver*, 189 Colo. 462, 466, 542 P.2d 79, 82 (1975).* Clearly it may be

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ion dissenting from decision to remand) (1974); *Daikeler* v. *Zoning Board of Adjustment*, 1 Pa. Cmwlth. 445, 275 A.2d 696 (1971); *Central Outdoor Advertising Co.* v. *Village of Evendale*, 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954); *Metromedia, Inc.* v. *City of Des Plaines*, 26 Ill.App.3d 942, 326 N.E.2d 59 (1975); *City of Naples* v. *Polk*, 346 So.2d 1076 (Fla.Dist. Ct.App. 1977); *see also Appeal of Ammon R. Smith Auto Co.*, 423 Pa. 493, 223 A.2d 683 (1966) (prohibition on flashing and intermittent lights on all signs within Township). The decisions cited above demand a close means-end fit between the total exclusion of billboards and advancement of traffic safety and aesthetics; the chronic under-inclusiveness of such ordinances has thus generally proven fatal, especially given the absence of any supported legislative findings that off-premise signs are either less attractive or more hazardous than on-premise signs. *See Daikeler* v. *Zoning Board of Adjustment, supra; Central Outdoor Advertising Co.* v. *Village of Evendale, supra; Metromedia, Inc.* v. *City of Des Plaines, supra.*

* A number of decisions have upheld prohibitions on outdoor advertising. While we believe the approach taken in these cases was, in varying respects, incorrect, it must be emphasized as well that they differ markedly from the present one in that generally they have involved small residential or rural communities. *Cf. Suffolk Outdoor Advertising Co.* v. *Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed*, 439 U.S. 808 (1978) [Town of Southampton]; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Board*, 369 Mass. 206, 339 N.E.2d 709 (1975) [Brookline, Mass.]; *Inhabitants of Town of Boothbay* v. *National Advertising Co.*, 347 A.2d 419 (Me. 1975) [Boothbay, Me.]; *Cromwell* v. *Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967) [Wallkill, N.Y.]; *United Advertising Corp.* v. *Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964) [Metuchen, N.J.]; *United Advertising Corp.* v. *Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952) [Raritan, N.J.]; *Murphy, Inc.* v. *Town of Westport*, 131 Conn. 292, 40 A.2d 177 (1944) [Westport, Conn.]. A single case has upheld a broader statutory prohibition, *John Donnelly & Sons* v. *Mallar*, 453 F.Supp. 1272

in no way analogized to the normal exercise of the zoning power first sanctioned by this Court in *Village of Euclid* v. *Ambler Realty Co., supra.* Such zoning, with which appellants have no quarrel, merely segregates uses according to district while retaining the totality of legitimate uses within municipal boundaries. Nothing of the sort has been done in San Diego.

The California Supreme Court upheld the ordinance on the basis of two governmental interests—traffic safety and aesthetics.* Even assuming that these interests could be deemed, under some circumstances, to meet the level of significance of the standards articulated above, the ordinance cannot withstand review.

At the most basic level, the City has totally failed to demonstrate that the "means" it has chosen are narrowly tailored to serve its proffered goals. The City offered no evidence whatever to support a conclusion that there is a link between traffic accidents in San Diego and billboards.**

(D.Me. 1978), *appeal pending,* No. 79-1575 (1st Cir.) [State of Maine]. That decision is currently on appeal and we believe it to have been wrongly decided.

* These interests are, in fact, difficult to reconcile. As the Oklahoma Supreme Court observed in *Oklahoma ex rel. Dep't of Transportation* v. *Pile,* 603 P.2d 337 (Okla. 1979), *cert. filed,* 48 U.S.L.W. 3699 (U.S. Feb. 11, 1980):

> "[T]he considerations of public safety and beauty as proffered by the state as a basis for prohibiting the speech signified by the defendant's billboard are mutually inconsistent. The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of the statement that billboards can be banned because they constitute a distraction to the drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one's eyes from the road." *Id.* at 342-43.

** In its brief to the Court of Appeal, the City relied instead on a number of cases upholding limited restrictions on billboards

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Indeed, what evidence there is suggests the contrary: not a single motorist or pedestrian accident has ever been reported to San Diego as being caused by the existence and maintenance of outdoor advertising signs. (Clerk's Transcript pp. 391-93) Indeed, counsel for the City of San Diego conceded that the "City was unaware of any particular person or any particular instance, fact situation, of someone being injured in an automobile accident because of an outdoor advertising sign." (JA 59a-60a)

Moreover, it is quite impossible to suggest that the enactment constitutes the "least drastic means" of serving the interests of traffic safety as the cases cited above require. It could perhaps be argued that the particular location of a billboard (*e.g.*, on a curve or near a particular intersection) might prove hazardous. But the legislation makes no effort to distinguish real hazards from unreal ones. It is suggested that because billboards solicit public attention they are generally distracting. (JS 7a) By this analysis so, too, is each type of sign exempted from coverage by the ordinance.* Such post-hoc rationalizations

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which it said "demonstrat[ed] that evidence to support this relationship is unnecessary." (Appellants Opening Brief at 13.) Again in the California Supreme Court, the City made clear that it was relying not on any evidence in the record or before the City Council, but on the "presumption of validity of zoning ordinances." Petition for Hearing at 24. However, as demonstrated, such a "presumption" is inapplicable when constitutional interests—such as those involved here—are implicated. When such interests are involved, unsupported claims of traffic safety have not been permitted to carry the day. *See Delaware* v. *Prouse*, 440 U.S. 648 (1979). *See also Craig* v. *Boren*, 429 U.S. 190 (1976). *See generally Troyer* v. *Town of Babylon*, 483 F.Supp. 1135 (E.D.N.Y.), *aff'd mem. sub nom. Troyer* v. *Town of Southampton*, 628 F.2d 1346 (2d Cir.), *aff'd*, 49 U.S.L.W. 3371 (U.S. November 17, 1980).

*It is difficult to understand why signs erected for a governmental purpose thereby pose any less a threat to traffic safety or aesthetic values. Nor is it credible that signs on moving vehicles,

for legislation that is both over and under-inclusive—and therefore clearly ineffective to accomplish its stated goals —simply cannot pass constitutional muster. *See Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979); *cf. Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562, 569 (1976).*

If anything, the justification for "elimination" of outdoor advertising premised on aesthetic values raises still more difficult questions. One need not dispute the proposition that some legislation may properly be based on such values to recognize the risk of allowing such values alone to suffice where conflicting constitutional values are at stake. While this Court has sustained legislation based, in part, on aesthetics (*Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978)), it has not done so in the face of significant First Amendment challenge. Nor has it done so where the legislation in question involved a flat city wide prohibition on particular activity. On the contrary, the Court in *Penn Central* took note of the New York City landmarks designation procedures which provided for an opportunity for individualized evaluation of the aesthetic value in preserving a particular structure as against the competing needs of its owner. *See, e.g., id.* at 112-14; *cf. id.* at 116-17, 136-37. It is pre-

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or public service signs limited to time and temperature are any less dangerous or unattractive. Yet all such signs are exempt from coverage. Indeed, signs on moving vehicles (including signs which provide revenue to San Diego by being placed upon city-owned buses) would appear to pose even greater safety risks to motorists and pedestrians alike.

* Such flaws have been relied upon in invalidating regulations which, like the ordinance at issue here, prohibit, in the interest of "traffic safety", the use of off-premise signs, while permitting the use of on-premise signs. *Metromedia, Inc.* v. *City of Des Plaines*, 26 Ill.App.3d 942, 945-46, 326 N.E.2d 59, 62 (1975); *Central Outdoor Advertising Co.* v. *Village of Evendale*, 54 Ohio Op. 354, 357-58, 124 N.E.2d 189, 194 (C.P. 1954).

cisely the absence of any effort to deal with the specific aesthetic and other interests involved which is one reason the present ordinance is infirm.

There is, as well, a broader problem in permitting the mere invocation of aesthetics to serve as a virtual license to destroy a medium of communication. By their nature, aesthetic judgments relate to matters of taste, tone and mood. Tastes differ. The distaste of one observer for a medium may be matched by the enthusiasm of another.

The final quotation in the opinion of the California Supreme Court—the Ogden Nash verse (JS 47a)—is illustrative of the personal nature of such judgments. One might well compare Nash's views with that of a leading international publication of graphic arts which concluded as follows:

> "Ogden Nash thought that he would never see a billboard lovely as a tree, but he might have changed his mind if he could have seen what is happening now in California. Parallel to the rise of painted walls, an attempt is being made to turn the billboard into Big Art, a movement which recently won recognition, when the California Museum of Science and Industry devoted an exhibition to it." Editor's Note to Rubenstein, *Big Art—The Art of the Billboard,* 34 Graphis, No. 199, at 448 (1978-79).*

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* The artistic importance of billboards and their contribution to the urban landscape has been the subject of a number of recent exhibitions at such other museums as The Renwick Gallery in the Smithsonian Institution, the Los Angeles County Museum and the Museum of the University of California School of Architecture and Urban Planning. *See* Ross, *In Perspective—Los Angeles Environment As Art,* Progressive Architecture 22 (Aug. 1977); Editor's Note to Rubenstein, *supra* at 448 (1978-79); Long Beach Independent Telegram, Mar. 14, 1976. *See also* Nash, "Seaside Serenade," in *The Face Is Familiar* 184, 186 (1940) ["It's each to his taste and a taste to each."]

Of course, we do not suggest that because aesthetic evaluations differ aesthetic judgments cannot be made, let alone that aesthetic values lack meaning or import. But the mere invocation of such values tends to prove too much; it is all but impossible to assess—at least as law assesses matters—judgments which flatly and without fear of contradiction determine that in the eye of the decision-maker one thing or another is ugly or unattractive. Such statements are, in their own terms, irrefutable. But it is precisely this non-rational (hence non-reviewable) quality of aesthetic judgments which signals the need for the closest scrutiny to assure that constitutional rights are not overcome on so subjective and often evanescent a basis.

Far from reflecting the care these concerns should have evoked, the decision of the California Supreme Court took account of none of the limitations on governmental actions set forth above. No weight at all was accorded to the values served by distinct media. No weight was accorded the disfavor with which total prohibitions of businesses have historically been viewed. Nor did the opinion apply the correct legal standards, as required by constitutional principles, to the stipulated facts. The total prohibition on outdoor advertising in the second most populous city of our nation's most populous state cannot be sustained.

CONCLUSION

The decision of the California Supreme Court should be reversed.

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Of Counsel:

DEAN RINGEL
SUSAN BUCKLEY
SUSAN E. FINE
MARTHA A. SCARF
CAHILL GORDON & REINDEL

THEODORE B. OLSON
515 South Flower Street
Los Angeles, California 90071
(213) 488-7000

Of Counsel:

WAYNE W. SMITH
GIBSON, DUNN & CRUTCHER

Attorneys for Appellants

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